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Cent. & H. R. R. R. (1894) 144 N. Y. 75, 38 N. E. 992. Nor can the plaintiff prevail upon the theory of an interference with the *jus publicum*, since neither does he sue in an appropriate form of action, nor upon this ground. However, the court probably based its decision more on natural justice than on syllogistic logic. Courts of equity allow one who, in good faith, makes improvements on the land of another, to recover their value. *Bright v. Boyd* (C. C. 1841) 1 Story 478; *cf. Parsons v. Moses* (1864) 16 Iowa 440. Analogically a riparian owner who, *bona fide* under color of title, extended the line of high water to another's land, should recover his original riparian situation and rights. Money damages are inadequate. The defendant town was not itself privileged to make such improvement, and since the plaintiff offers to restore the *status quo* at his own expense, the result reached in the instant case involves no hardship to either party.

SALES—ACCEPTANCE AS WAIVER OF DAMAGES FOR BREACH OF WARRANTY OF QUALITY.—The seller of flour sued for the balance due on a shipment and the buyer counterclaimed, alleging damages because of the inferiority of the flour. Although he had notified the seller of the defect in the flour and had only retained it upon the seller's request "to go ahead and do the best they could with it", the court held that the acceptance of the goods operated as a waiver of the buyer's right to sue for the breach. *Lykens v. Bowling* (Ky. 1920) 221 S. W. 519.

This case is in accord with prior Kentucky authority to the effect that the mere acceptance of goods terminates the buyer's right to damages arising out of a breach of warranty as to quality. *Jones Bros. v. McEwan* (1891) 91 Ky. 373, 16 S. W. 81. This rule is followed in several jurisdictions. *Cf. General El. Co. v. Interstate El. Co.* (Mo. 1919) 209 S. W. 562; see *Nelligan v. Knutsen* (Cal. 1918) 175 Pac. 18; *Staiger v. Soht* (1907) 116 App. Div. 874, 102 N. Y. Supp. 342, *aff'd.* (1908) 191 N. Y. 527, 84 N. E. 1120. The contrary view, however, is more generally accepted. *Campion v. Marston* (1904) 99 Me. 410, 59 Atl. 548; *Northwestern Cordage Co. v. Rice* (1896) 5 N. D. 432, 67 N. W. 298. This is the rule of the Uniform Sales Act, § 49. It will be noted that in New York the common law is thereby changed. *Cons. Laws* (1909) c. 45 § 130; *Shearer v. Kakoulis* (1913) 144 N. Y. Supp. 1077; *English Lumber Co. v. Smith* (1916) 157 N. Y. Supp. 233. The same result may be attained in this type of case by subjecting the buyer to an action of *quantum valebant* for the inferior goods. See *Hooper v. Herring* (1915) 14 Ala. App. 455, 70 So. 308. Whether the buyer agrees to waive deficiencies in performance should logically be a question of fact in each case. The mere fact of acceptance of title to goods does not, of itself, warrant the conclusion that the buyer has agreed to surrender a claim against the seller arising out of any defect in the quality of the goods. See *Williston, Sales* (1909) § 488. This is particularly true where, as in the instant case, the buyer specifically calls the attention of the seller to the inferiority of the goods. Under these facts the Kentucky Court might well have distinguished the instant case from cases where the buyer accepts goods of inferior quality without protesting at the time.

SPECIFIC PERFORMANCE—MARKETABILITY—RESTRICTING ORDINANCE.—The defendants contracted separately with the plaintiffs and one Flagg to purchase their respective lots which were contiguous. The defendants' obligation to the plaintiffs was contingent upon simultaneous delivery

of the two deeds, and upon the marketability of the Flagg title. The defendants' understood purpose was to erect a business building upon the entire plot. A municipal zoning ordinance, adopted after the contract was entered into, prohibited erection of such a building within a district which included the Flagg property. The defendants refused to accept a deed from the plaintiffs, who now seek specific performance. *Held*, relief granted. *Biggs et al. v. Steinway & Sons* (1920) 229 N. Y. 320, 128 N. E. 211.

A restriction similar to that imposed upon the Flagg premises by the ordinance, if a covenant running with the land, would constitute an incumbrance in impairment of marketability of title. *Kountze v. Helmuth* (1893) 67 Hun 343, *aff'd*, 140 N. Y. 432, 35 N. E. 656; *Bull v. Burton* (1919) 227 N. Y. 101, 124 N. E. 111; 20 Columbia Law Rev. 76. But as the restriction in the instant case is the result of a valid municipal zoning ordinance, the marketability of title to the Flagg property is not affected thereby. *Lincoln Trust Co. v. Williams Bldg. Corp.* (1920) 229 N. Y. 313, 128 N. E. 209. The distinction seems sound for, while such an ordinance does regulate the use of that lot, it does not subtract from the fee in the same way as an easement. As the premises of the plaintiffs are not within the restricted district, the defendants may still use them for their purpose, and on that ground the instant case is distinguishable from *Anderson v. Steinway & Sons* (1917) 178 App. Div. 507, 165 N. Y. Supp. 608, *aff'd*, 221 N. Y. 639, 117 N. E. 575. For in that case, the ordinance restricted the use of the property sought to be transferred. But it is submitted that both cases fall within the principle that mere change of circumstances, after the making of a contract, not caused by the parties, is not ground for refusal of specific performance, in the absence of unusual hardship to one of the parties, with correspondingly little benefit to the other. See *Franklin Tel. Co. v. Harrison* (1892) 145 U. S. 459, 12 Sup. Ct. 900; *Marble Co. v. Ripley* (1870) 10 Wall. 339; *Pomeroy, Specific Performance of Contracts* (2nd ed. 1897) § 189.

SUBROGATION—MORTGAGES—FAILURE TO EXAMINE RECORDS.—X, being indebted to A, gave him a chattel mortgage as security. X then mortgaged the property covered by the mortgage to A together with other personal property as security for a loan from B. Both mortgages were duly recorded. A threatened to foreclose. By fraudulently representing to the plaintiff bank that his property was unincumbered, X secured a loan, executing a mortgage on the property included in the mortgages to A and B as security. X then paid \$2,000 of the money so obtained to A. Soon afterward X died and his property was sold by a receiver. After deducting the balance of A's claim from the proceeds, \$2,127 remained. The plaintiff claimed subrogation to the right of A to the extent of \$2,000. *Held*, one judge dissenting, subrogation denied on the ground that the plaintiff was negligent in not searching the records. *Southern Trust Co. v. Garner* (Ark. 1920) 223 S. W. 369.

One whose property is fraudulently applied to the payment of a creditor will be subrogated to the rights of the latter. *Heller Aller Co. v. Ries* (1911) 164 Mich. 501, 129 N. W. 724. And where money obtained by fraud is used to pay a debt of the fraudulent party, subrogation will be granted so long as innocent third parties are not affected. *State Sav. Trust Co. v. Spencer* (Mo. 1918) 201 S. W. 967; *Pittsburgh-Westmoreland Coal Co. v. Kerr* (1917) 220 N. Y. 137, 115 N. E. 465. The question then arises whether or not negligence on the part of the